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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KELLI GRAY, and all other similarly
situated,

Plaintiff,

v.

SUTTELL & ASSOCIATES;
MIDLAND FUNDING, LLC; MARK
T. CASE, and JANE DOE CASE,
husband and wife, KAREN HAMMER
and JOHN DOE HAMMER

Defendants.

Case No.: CV-09-251-EFS

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO COMPEL
DISCOVERY RESPONSES TO
PLAINTIFF'S SECOND SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION

I. Discovery Standard

Under Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter,
not privileged, which is relevant to the subject matter involved in the pending

MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL DISCOVERY

- 1 -

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1 action." As a general matter, "relevance" for discovery purposes is broadly
 2 construed, and "information sought need not be admissible at the trial if the
 3 information sought appears reasonably calculated to lead to the discovery of
 4 admissible evidence." Fed. R. Civ. P. 26(b)(1); *see, e.g., Lewis v. ACB Business*
 5 *Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) ("The scope of examination
 6 permitted under Rule 26 (b) is broader than that permitted at trial.") (internal
 7 quotation marks omitted). Courts have long held that pretrial discovery is "to be
 8 accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507
 9 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to
 10 preclude a party from inquiring into the facts underlying his opponent's case."). *See*
 11 *also Madden v. Turner Broadcasting Systems, Inc.*, 1998 WL 458188, at *2 (3d
 12 Cir. 1998) (same); *see also, e.g., Katz v. Batavia Marine & Sporting Supplies, Inc.*,
 13 984 F.2d 422, 424 (Fed. Cir. 1993) ("It is a premise of modern litigation that the
 14 Federal Rules contemplate liberal discovery, in the interest of just and complete
 15 resolution of disputes."); *Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995)
 16 ("The Federal Rules of Civil Procedure creates a 'broad right of discovery' because
 17 'wide access to relevant facts serves the integrity and fairness of the judicial
 18 process by promoting the search for the truth.'"); *Hickman*, 329 U.S. at 507. Of
 19 course, district courts have considerable discretion in handling discovery
 20 matters. *See, e.g., Brune v. IRS*, 861 F.2d 1284, 1288 (D.C. Cir. 1988); *Laborers'*

1 *Int'l Union of N. Am. v. Department of Justice*, 772 F.2d 919, 921 (D.C. Cir. 1984)
2 ("Control of discovery is a matter entrusted to the sound discretion of the trial
3 courts.".)]

4
5 II. Plaintiff's Second Set of Requests for Production and Interrogatories

6 On June 15, 2010, Defendant Midland Funding was served with Plaintiff's
7 Second Set of Requests for Production and Interrogatories. On July 16, 2010,
8 Defendant Midland Funding served their Response to Plaintiff's Second Set of
9 Requests for Production and Interrogatories. Defendant Midland Funding objected
10 to every single interrogatory.
11

12 The Defendant produced approximately three hundred and eighty-two pages
13 (382), only twenty two (22) of which relate to the Plaintiff's requests.
14

15 Three hundred and six (306) pages printed from the Washington Court's
16 website showing the results of a search for cases filed by "Midland Funding, LLC"
17 in each of Washington State's thirty-nine (39) counties. This information is useless
18 to the Plaintiff. As indicated by the printouts, the Washington Court's website does
19 not produce reliable results. The query "Midland Funding, LLC" does not capture
20 all the Midland Funding cases. The Plaintiff has discovered that occasionally the
21 Court clerks omit the "LLC" from the caption. These results are not included. The
22 Defendant has accurate records of the cases it has filed in Washington, but did not
23
24
25

1 produce them. Printouts from the Washington Court website are not an acceptable
2 substitute.

3
4 Defendant Midland Funding also produced an additional seventy-six (76)
5 pages marked as bates one (1) through seventy-six (76). Bates thirty-three (33)
6 through seventy-six (76) are the documents filed in State Court. This information
7 was given to Defendant Midland as part of Plaintiff's initial disclosures. The
8 remaining twenty-two (22) pages consist of five (5) "Spiegel" statements (one (1)
9 of which was a part of the state court file, and the remaining four (4) postdate the
10 existence of FCNB), and sixteen (16) pages of coded account history from the
11 Midland Funding database.
12

13
14 Defendant Midland Funding did not respond with information regarding its
15 contractual relationship with Suttell (if any) or information from Midland
16 Funding's records regarding lawsuits filed in the state of Washington.
17

18 The Defendant failed to adequately respond to the following requests:

19 A. Interrogatories

20 Interrogatory # 6. Midland Funding, LLC did not object and did not answer
21 Interrogatory Six (6).
22

23 Interrogatory # 3, 5, & 7. Plaintiff's Interrogatories three (3), five (5) and
24 seven (7) request a list of information about lawsuits and the parties to the lawsuits
25 filed by Midland Funding against putative class members. Defendant Midland

1 Funding, LLC objected to the Plaintiff's interrogatory as unduly burdensome,
2 beyond the scope of the discovery rules, and not relevant prior to class
3 certification. No list was provided. The Defendant attached pages printed from the
4 Washington Courts website listing cases filed by Midland Funding. The production
5 of the website printouts does not answer the Interrogatories presented.
6

7 Defendant Midland Funding, LLC further objected, "[p]leadings are equally
8 available from the clerk's office." It is not a valid basis for objecting or refusing to
9 fully respond because the information is available from another source if the
10 information is in the responding party's possession, custody or control. *See*
11 *Lockwood v. Shands Jacksonville Medical Center Inc.*, 2010 WL 2035117
12 (M.D.Fla., 2010.); *Gabby v. Meyer*, 2006 WL 2794316 (E.D.Wis., 2006).
13

14 Notwithstanding the inadequacy of the production, Defendant Midland Funding,
15 LLC has information to complete the request in electronic form. Defendant
16 maintains a sophisticated fully relational database of the accounts it purchases. The
17 database contains fields which may be searched to provide the information
18 responsive to Plaintiff's Interrogatories. For example, Defendant Midland Funding
19 LLC's Bates No. 2 has a field containing "FCNB-Spiegel." The Plaintiff's believe
20 the Defendant can run a search for this term in this field and produce a list of all
21 accounts labeled "FCNB-Spiegel." The Plaintiff specifically requested this
22 information. Defendant Midland Funding, LLC objected and did not respond. In
23
24
25

1 the past, the Court has ordered defendants using similar software and making
2 similar objections, to download or export the database to another version of the
3 software under the plaintiff's control. If necessary, the Plaintiff is prepared to take
4 similar action in this matter.

5
6 Interrogatory # 8. The answer is incomplete. The Interrogatory requests a
7 description of all attorney fees billed to or by Midland. The answer describes the
8 relationship between Midland Funding and its subsidiary company Midland Credit
9 Management, Inc. Information regarding the attorney fees billed to or by Midland
10 is necessary because the Plaintiff has alleged a violation of the Washington
11 Consumer Protection Act ("WCPA"), RCW 19.86 *et. seq.* One element a WCPA
12 claim is that the deceptive act occurs in trade or commerce. *Hangman Ridge*
13 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531
14 (1986). With respect to attorneys, the "in trade or commerce" element is satisfied if
15 the act is in the "entrepreneurial" aspect of the practice of law. The
16 "entrepreneurial" aspect includes how clients are billed and attorney fees
17 determined. *Short v. Demopolis*, 103 Wash.2d 52, 62, 691 P.2d 163 (1984). A
18 complete response is necessary to the Plaintiff's case.

19 Interrogatory # 9 & 10. The answer is incomplete. Interrogatory Nine (9)
20 asks how Midland Funding determines the statute of limitations on accounts it
21 purchases and the qualifications of the person making that determination. No
22

1 procedure is described. No name is given. Midland Funding, LLC further objects
2 based on attorney-client privilege. This objection is inconsistent with Midland
3 Funding, LLC's position that it did not contract with Suttell & Associates, P.S.,
4 and inappropriate, given the information requested. Midland Funding, LLC's
5 records indicate the statute of limitations was determined before it was sent to
6 Suttell & Associates, P.S. for collection. Further, a privilege log is not produced.
7
8

9 The Defendant has raised the "bona fide" error affirmative defense. (Ct. Rec.
10 9, p. 19, Midland Answer; Ct. Rec. 13, p. 21, Suttell Amended Answer). To prevail
11 on the "bona fide" error defense, the Defendant must prove the violation of the
12 FDCPA occurred "notwithstanding the maintenance of procedures reasonably
13 adopted to avoid any such error." 15 USC § 1692k(c). The Plaintiff needs
14 information regarding Midland Funding's policies and procedures with respect to
15 its determination of the appropriate statute of limitations to explore what steps
16 Midland Funding, LLC took to determine the appropriate statute of limitations and
17 avoid filing time barred lawsuits.
18
19

20 B. Requests for Production 21

22 Request for Production # 26 & 27. Plaintiff requests production of all
23 agreements granting Suttell the right to collect on behalf of Midland Funding,
24 LLC. Midland Funding, LLC objects based on attorney client privilege. This is
25 inconsistent with Midland Funding, LLC's position that it did not hire an attorney.

1 No privilege log is provided. As discussed above, the information is relevant and
 2 necessary to establish the “in trade or commerce” element of Plaintiff’s WCPA
 3 claims. *See Short*, 103 Wash.2d 52.
 4

5 Request for Production # 31. Defendant Midland Funding, LLC objects to
 6 the request as conclusory. The objection is improper and should be stricken.
 7 Midland Funding should be required to state that there are no more responsive
 8 documents.
 9

10 Request for Production # 29 & 40. Defendant Midland Funding, LLC
 11 objects to the production of documents related to the putative class members pre-
 12 certification. The Defendant argues that there should be no class wide discovery
 13 until a class ruling carries little weight and has been rejected by the courts. See e.g.
 14 *Pittman v. Anaconda Wire & Cable Co.*, 408 F. Supp. 286, 296 (E.D. N.C.
 15 1974)(Over defendant's objections that interrogatories were relevant only if the
 16 court certified the class action, the court ordered defendants to answer because the
 17 information had a direct bearing on class certification).
 18
 19

20 As noted in Manual for Complex Litigation (2d ed.):
 21

22 Often, however, bifurcating discovery in this manner will be
 23 counterproductive. Discovery relating to "class issues" is not always
 24 distinguishable from other discovery. Moreover, the key question in
 25 class certification is often the similarity or dissimilarity of the claims
 of the representative parties to those of the class members—an inquiry
 that may require some discovery on the "merits" and development of
 the basic issues. Nor will discovery into matters affecting other

1 members of the putative class necessarily be wasted if a class is not
2 certified, for in many cases this information will be valuable as
3 circumstantial evidence.

4 Moreover, the observations made in the Manual, Second, were carried over into
5 the Manual for Complex Litigation (3d ed.), but stated slightly differently:

6 Bifurcating class and merits discovery can at times be more efficient
7 and economical (particularly when the merits discovery would not be
8 used if certification were denied), but can result in duplication and
9 *unnecessary disputes* among counsel over the scope of discovery.

10 In this case, even if class certification were denied the merits discovery of
11 the other consumers' information relevant to the Defendant's bona fide error
12 affirmative defense.

13 Further, the Court's scheduling order requires all motions to compel be
14 filed by October 13, 2010. (Ct. Rec. 18, p. 4-5). The hearing on Plaintiff's Motion
15 to Compel is set for September 9, 2010. It is likely the Plaintiff will not have the
16 opportunity to timely move to compel production of these documents after class
17 certification has been decided.
18

19 20 III. Sanctions

21 The Court has discretion to award "reasonable expenses incurred in making
22 the motion, including attorney's fees." Fed. R. Civ. Pro 37(a)(5)(A). Therefore,
23 the Plaintiff requests that the Court award her reasonable expenses and attorney
24 fees in connection with this motion, should she prevail.
25

IV. Certificate of Counsel

I certify that I have in good faith conferred with John D. Munding of *Crumb & Munding, P.S.*, the attorney for the Defendant Midland Funding, LLC, on July 30, 2010 in an effort to secure the discovery disclosures without court action.

Dated this the 10th day of August, 2010

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s/ Scott M. Kinkley
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CM/ECF CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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